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No. 90-1062

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1990

RAINBOW NAVIGATION, INC. and
INTERNATIONAL ORGANIZATION OF
MASTERS, MATES AND PILOTS,

Petitioners,

v.

DEPARTMENT OF THE NAVY, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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1. There is no dispute that a treaty which has a plain meaning which admits of no ambiguity must be read as it stands, without reference to extratextual sources. Where does such a remarkable document exist, however? Certainly not in this case nor in most if not all treaty interpretation cases that have come before the Court. The great, endangering fault in the court of appeals opinion is that it finds purported clarity in treaty documents where none exists, then uses that purported clarity to overcome a ratification history specifically intended to give meaning to those documents. Unless the threshold determination of "clarity" is held to a standard of reasonableness in this leading case, the Executive Branch and the courts will have a clear precedent for ignoring at will the record developed in future Senate treaty ratifications. That would be contrary to the principle of treaty construction upheld in *United States v. Stuart*, 489 U.S. 353 (1989),

and would render superfluous the Senate's advice and consent role under Article 2, §2, cl. 2 of the U.S. Constitution.

2. The focus of the Federal Respondents is on the Treaty's applicability to "both United States flag carriers and Icelandic shipping companies." Fed. Resp. Brief 8-9. Under their view of the "plain" meaning of this language, so long as a U.S. flag carrier gets an award and that award covers at least 35% of the cargo, the meaning of the Treaty and MOU is honored. This conclusion is premised on a highly selective reading of the treaty documents. The fact that the Treaty requires an award to the U.S. flag is, standing by itself, meaningless. Such an award is otherwise required by the 1904 Preference Act. The Treaty and MOU create a limited exception to the 1904 Preference Act. It is other language in the Treaty and MOU which accomplishes the accommodation with the 1904 Act which was central to the concerns of both the Executive Branch and the Senate. That other language includes the commitment to assure both flags a "viable presence in the trade" and to assure the U.S. flag a "fair rate that adequately covers the carrier's costs, assuming normal efficiencies of operation, plus a reasonable profit." Treaty, Art. I (App. 2b); MOU, Par. 1 (App. 4b). "Viable presence" and "normal efficiencies of operation" is the operative language of the treaty documents. This language defies a plain meaning interpretation and begs reference to extratextual sources, yet it is ignored in the Brief of the Federal Respondents.

3. The ratification record must be read in its entirety and against the background of the long-standing dispute in the Iceland trade. It was a carefully crafted compromise, and that compromise was spelled out by Secretary Derwinski at the hearing and reiterated in the Committee Report. When Judge Greene found that the Treaty and MOU **required** (i) that "the existing United-States flag service in the Iceland trade would not be disadvantaged as a result of the treaty" and (ii) that "the economic viability of that service will be maintained just as if the 1904 Act were fully in effect," 699 F. Supp. at 344 (App. 23a), he was not voicing an opinion. He was quoting from the Committee Report which, in turn, was based on the direct representations of the Executive Branch. The Federal Respondents, as did the court of appeals, find this history to be ambiguous. Fed. Resp. Brief 10. If it is ambiguous, it is certainly far less so than the operative language in the treaty

documents. Moreover, to the extent that the ratification record leaves questions unanswered, those questions were resolved by the simultaneous implementation of the treaty by the Navy.

4. The court of appeals, without examining the record, held that the Navy's initial implementation of the treaty was no more than a temporary frolic dictated by operational concerns rather than by a compelling interpretation of the treaty requirements. The court of appeals also stated that Rainbow had provided "no basis for doubting" that operational concerns were the governing factor. 911 F.2d at 802 (App. 11a). In fact, Rainbow had tried this factual issue in the district court, and Judge Greene found, on the basis of the record, that the Navy's argument in this regard was pretextual. 699 F. Supp. at 345 (App. 24a). The Federal Respondents walk around this failing in the opinion by restating, in a footnote, the arguments advanced in the Navy's trial affidavit. Fed. Resp. Brief 11 n.9. Those same arguments, together with the facts developed by Rainbow in the course of discovery, led to Judge Greene's finding of pretext. The trial court's finding on this crucial factual issue is entitled to great weight, however stated.[1]

5. Eimskip argues that the ratification record is no more than an "expression of domestic policy" and is not entitled to great weight. Eimskip Brief 14-15. Since Eimskip now concedes that the ratifica-

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[1] Judge Greene's factual finding that the 1987 RFP was based on what the Navy believed the Treaty and MOU to require and not on operational considerations is reviewable under the clearly-erroneous standard or, at the very least, under the "deferential" abuse of discretion standard. *Cf. Pierce v. Underwood*, 487 U.S. 552, 558-62 (1988); *Thornburg v. Gingles*, 478 U.S. 30, 78-79 (1986). It is not subject to *de novo* review.

tion was not a formal reservation, it appears to be saying that the remarks of Secretary Derwinski *et al.* were no more than precatory. Suffice it to say that this argument was abandoned by the Federal Respondents in the early stages of the proceeding below. *See* 686 F. Supp. at 357 n.17 (App. 42a).

Respectfully submitted,

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